1954

Maybell Griffiths v. Archulious Buttars Archibald and David Archibald : Brief of Respondent

Utah Supreme Court

In the Supreme Court of the State of Utah

MAYBELL GRIFFITHS,
plaintiff and appellant,

vs.

ARCHULUIS BUTTARS
ARCHIBALD and
DAVID ARCHIBALD,
defendants and respondents.

Respondent's
Brief
Case No. 8135

Appeal from the District Court of the First Judicial District of the State of Utah In and for the County of Cache

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Hon. Lewis Jones, Judge

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and Respondents.

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STATEMENT OF FACTS

The plaintiff, who lives to the East of defendant in Clarkston, in Cache County, claims an easement by adverse use against defendant. Clarkston is on the West side of the Valley, and where the slope is from the West to the East. During the trial of the case, the Court sent the jury to view the premises prior to rendition of the verdict. During the trial the plaintiff testified (tr. 41) that she never used the ditch against the will of anyone, and that she was not using the ditch against the will of her sister. When the plaintiff closed her testimony a motion to dismiss was argued in chambers, and when

the Court indicated his intention or granting the motion (tr. 59) plaintiff was granted a motion to re-open for the purpose further testimony by plaintiff, and when plaintiff was again on the stand (tr. 61) she changed the entire nature of her testimony in an attempt to establish a hostile usage, and testified after having her attorneys explain the nature of adverse usage (tr. 63). After much explanation plaintiff admitted that the adverse and hostile use of the ditch began in 1952 (tr. 71) when the family were trying to settle their Mother's estate, which resulted in several lawsuits in which plaintiff and defendant were upon opposite sides. Defendant's exhibit "2" is the first notice defendant had that her sister, plaintiff, claimed an absolute right to the use of the ditch. It was because of the nature of plaintiff's testimony that the jury found that the use of the ditch had been by permission, and they therefore, found in favor of the defendant (tr. 88). In 1946 the husband of plaintiff sought permission from a son of defendant to use the ditch, and other times sought permission from husband of defendant (tr. 90). The son remembered these requests back to 1942 (tr. 95). The ditch in question was put in about 1938 (tr. 101) by an agreement and between plaintiff and defendant's husband (tr. 101-102), in the condition it existed just prior to the trial, although it had been used before, but always by permission, so far as plaintiff is concerned. The jury understood thoroughly what was meant by the use of the term "hostile", because it was discussed

as bearing on the question of use by or without permission (tr. 105). In fact the defendant herself assisted her sister with the water (tr. 109).

The water was generally used on plaintiff's lot prior to her purchase of it about 1928 (tr. 111). Defendant's husband stopped plaintiff's use of the ditch in 1952 because the plaintiff had failed to ask his permission to use it in 1951 (tr. 115) and because the husband had lost a right in former years by adverse use, he knew that if plaintiff used the ditch by permission, plaintiff could not gain a right by adverse user (tr. 115). Witness Archibald (husband of defendant) had worked this property and knew that there was no ditch across the property prior to 1938 (tr. 116). He had rented both the property of plaintiff and of defendant (tr. 117) until plaintiff bought her piece. Each year from 1931 on (the ditch was located in a different place then, and to the North, in the barnyard of defendant) the plaintiff sought, and was given permission to use the ditch. Mr. Archibald testified: "And then from '30 up until '51 he (plaintiff's husband) had my permission to use that water, and he didn't ask me in '51 so in the spring of '52 I told him not to use it." Q. "Did he ever tell you in substance or effect that he had a right to the use of it? A. No, he just came and asked me if he could take the water through. Q. Did he ever use it in any year except 1951 without coming to see you? A. Every year he asked me" (Tr. 118). In 1946 Mr. Archibald plowed up the ditch and planted grass, and again Mr.

Griffiths sought his permission (tr. 120). It was on such testimony that the jury found that there was permissive use, or as put in the special verdict "friendly" use up till 1952, and upon such testimony that the Court below based his judgment on verdict.

RESPONDENT'S STATEMENT OF POINTS RELIED ON TO AFFIRM THE LOWER COURT:

POINT I. THE COURT DID NOT ERR IN RENDERING JUDGMENT AGAINST THE PLAINTIFF.

POINT II. THE COURT DID NOT ERR IN SUBMITTING SPECIAL INTERROGATORY No. 3; NOR DID IT ERR IN GIVING INSTRUCTION No. 1.

POINT III. THE COURT DID NOT ERR IN FAILING TO GIVE THE INSTRUCTION AS SET OUT IN APPELLANT'S POINT III.

ARGUMENT—POINT I

At the outset it seems apparent to the writer that appellant has misconceived the nature of the case as presented by her to the lower Court. At the very outset of the testimony of the plaintiff herself (tr. 34, 35 and 36), she told the Court and jury that the property she now owned had been irrigated by ditches running through respondents' property as long as she could remember and one of those ditches was exactly the same as she is seeking to quiet title to (tr. 35). Q. "Is this the ditch which you seek to quiet title to? A. Yes, sir. Q. Was the ditch in existence when you purchased your lot? A. Yes, sir. Q. Was it in existence when you commenced this action last June? A. Yes, sir. Q. Has its course materially changed since 1926? A. No sir." To the same

effect is the testimony of her husband (tr. 47).

It is to be remembered that in the Utah case of Cache Valley Banking Co., v. Cache Co. Poultry Gr. Ass'n. 209 P. 2d 251, this Court held exactly opposite to the contention of the appellant in this case. Said the Court:

> "The presumption stated in that rule is that in the absence of evidence to the contrary, the trier of fact is required to find that the use was with the permission of the owner and not under a claim of right. Here all of the elements required to establish that presumption are present . . . Plaintiff also produced direct evidence to the effect that the commission company considered the use of that property as a roadway as permissive and not under a claim of right".

The Court then reversed the lower court, which had held that there was an easement by adverse user. But, we have presented a much stronger case on this appeal, by presenting evidence that each year until 1951, the plaintiff sought and obtained permission for the use of the ditch in question, and the Court and jury evidently believed this testimony. There was no such permission sought or given in the Cache Valley Banking case.

Taking, again, the plaintiff's theory of the evidence, the testimony of Melvin Buttars, brother of plaintiff, there can be no doubt left as to the proper rule as to the presumption to be indulged in here. "Q. Is there a culvert at the west end of the ditch? A. Yes. Q. Do you know who placed that culvert there? A. Father

had it placed there . . . Q. Is your father alive? A. No. Q. When did he die? A. 1916. Q. How long has that ditch been in existence? A. Well, now, it's been there for fifty years. Q. Have you ever observed the ditch being used for irrigation purposes? A. Yes. Q. What land was it used to irrigate? A. Those lots. Q. Which lots? A. The ditch was used for the lots after they had got them, they used them to water the east lot. Q. That's the plaintiff's lot now? A. Yes (tr. 45-46)." Whether or not this testimony along with that of plaintiff, herself, is a correct statement of fact, it is binding on her. If their version prevails, the presumption is against the adverse user; if defendant's version prevails, the easement was never used adversely until 1951. Therefore, plaintiff cannot prevail under either theory.

In the Utah case of Buckley v. Cox 247 P. 2d 277, this Court said:

> "A presumption well established in this state is that where a person opens a way for the use of his own premises, and another person also uses it without causing damage, in the absence of evidence to the contrary, such use by the latter is permissive, and not under a claim of right. (several other Utah cases there cited). It was defendant's burden to overcome this presumption and to establish his claim by clear and convincing evidence. This in the judgment of the lower court, he failed to do."

If we assume that the lower Court had held that an easement by prescription through adverse and hostile user, existed, it is firmly believed that this Court

would be under the necessity of reversing the decision for utter lack of evidence.

It is anticipated that counsel for plaintiff is laboring under the impression that in Utah the early common law of presumption of a grant is followed. This is an error as pointed out by this Court in the Utah case of Big Cottonwood Tanner Ditch Co. v. Moyle 109 Ut. 213, 174 P. 2d 148 where it is said:

> "But the common law went back one more step and found that such use *against* (Court's italics) and not under the owner or with his permission was evidence that the owner or his predecesors in interest had granted the right of use . . . It was in order to get away from that result that we are now holding that the English common law in that regard does not apply to easements for irrigation ditches in Utah."

That was written in November, 1946. In December. 1946, this Court then rendered its decision in the case of Zollinger v. Frank, 175 P. 2d 714, and it was this case that inspired the long annotation in 170 A. L. R. 770, beginning at p. 776. The Frank case is there listed under the heading (p. 778) "II. PREVAILING RULE. a. Presumption of adverseness from Use". It is most likely that counsel falls into error by not distinguishing the Frank case from the case at bar, and by failing to take into account the Buckley case (supra) which was decided on August 20, 1952, and Sdrales v. Rondos (Utah, 1949), 209 P. 2d 562.

The case here presented as had a solid foundation

in the laws of Utah for many years ,as was very aptly expressed in the Utah case of Jensen v. Gerrard, 39 P. 2d 1070:

> "A twenty year use alone of a way is not sufficient to establish an easement. Mere use of a roadway opened by a landowner for his own purpose will be presumed permissive. An antagnostic or adverse use of a way cannot spring from a permissive use. A prescriptive must be acquired adversely. It cannot be adverse when it rests upon a license or mere neighborly accommodation. Adverse user is the antithesis of permissive user . . .
>
> Since the defendants claimed the right to use the roadway by prescription, the burden was upon them to establish such claim by clear and satisfactory evidence."

While the authority of the Utah Court sufficiently supports the verdict of the jury and judgment, a very recent California case is interesting for purposes of this appeal. Arnold v. City of San Diego, 261 P. 2d 33:

> "The questions of whether the use of an easement is adverse and under a claim of right, or permissive and with the owner's consent, and whether the nature of the user is sufficient to put the owner on notice, are ordinarily questions of fact, and all conflicts must be resolved in favor of the prevailing party and the evidence viewed in the light most favorable to him."

For reasons stated in that case, it is felt that this Court will view the evidence presented by defendants most favorably to them. It should be remembered that

the jury went on the premises for a view. They no doubt, saw that there was a ditch to the South of plaintiff's property by the side-walk or path. They could easily see that plaintiff could as well use this ditch as the one coursing through the center of defendants' property; and they could easily see that the use of the ditch through defendants' property was merely a neighborly accomodation. If the Court views the evidence of defendants' most favorably to them, the only conclusion that can be reached is that the use, until 1952, was permissive.

POINT II

The arguments on Point I above apply with equal force to this point and are adopted on this point.

POINT III

In interrogatory No. 3, the Court below fully explained what was meant by the term "hostile". He said that a mere neighborly accomodation would not avail plaintiff. Those are the words used by this Court in Jensen v. Gerrard (supra); he told the jury that if the use was by permission, or as a sisterly accomodation, it could not be hostile. There is nothing which could possibly confuse the jury. All the answers are consistent. The jury found in No. 1, a long use, but not a hostile use. They found that the use had been open and notorious, but not adverse or hostile, and that such use did not become hostile until 1952, when plaintiff failed to gain consent to the use, and a dispute and lawsuits grew out of their Mother's estate, with the

parties to this case aligned against each other in those suits.

It is submitted that had the Court given the instruction set out in appellant's point III, and a verdict had been against respondent, it would have been reversible error as suggested in POINT I. Such an instruction would have violated the rule laid down in the Buckley case, the Big Cottonwood Tanner Ditch case, the Cache Valley Banking Co. case (all Supra) and many other Utah cases.

There is no contention about the importance of the use of water and waterways in this arid territory. Neither is there any question, as mentioned by counsel (p. 6 of the brief) on the matter of a resort to eminent domain. The plaintiff's property when it was all owned by the Father, was watered from the West to the East, and there is a ditch in the front (South) in present use, and through which plaintiff has a right to the use of, and this is one of the things that the jury no doubt noticed and placed much stress on. The son of defendant testified that there are no reasons why plaintiff could not use this ditch on the side path. Defendants' exhibit "1" is a plat of the properties in question. The red "B" is the ditch in question. On the South of the property is shown the original ditch and an arrow leading into plaintiff's property is where the water used to flow, and can and will flow (tr. 83). That was the testimony of Wallace who had actually used this route to put the water on the land plaintiff now owns.

It was the son, Boyd (tr. 88) who there testified that plaintiff's husband came to him to ask if he could put a ditch through the middle of the lot, and the boy referred the husband to his Father. He is a trained engineer with the Soil Conservation, Department of Agriculture, and a graduate of the Utah State Agricultural College in Irrigation Engineering (tr. 91), and failed to see any reason why water could not be put on plaintiff's property at point "Z".

Counsel lastly points to Holm v. Davis (Utah, 1912), 125 P. 403, as authority for the proposition that even if in the beginning the use was by consent, it may ripen into an easement by mere use only. This contention leaves out of the case here presented several important elements: (1) Consent was sought and had each year, (2) Plaintiff never did treat the ditch as her own as was the case in the Holm case (supra), (3) Each year defendant David Archibald gave his separate consent (tr. 118) because he knew that he may lose the right to object; and this continued from 1930 until 1951, (4) and in 1946 Mr. Archibald completely plowed the ditch under and planted alfalfa, and thereafter and before it was again used by plaintiff, she again sought permission.

The Holm case is not in point, and it is submitted that the lower Court should be affirmed.

Respectfully submitted,

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Attorney for defendants and respondents.